Nos. 21,621, 21,632 and 21,649

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21,621

GALLENKAMP STORES CO., *et al.*,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,632

K-MART, a Division of S. S. KRESGE COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,649

HOLLYWOOD HAT CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

RETAIL CLERKS UNION, LOCAL 770, affiliated with RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,

Intervenor.

On Petition to Set Aside an Order of the National Labor Relations Board.

BRIEF OF INTERVENOR, RETAIL CLERKS UNION, LOCAL 770.

ARNOLD, SMITH & SCHWARTZ,
GEORGE L. ARNOLD,
6404 Wilshire Boulevard,
Suite 950,
Los Angeles, Calif. 90048,

Attorneys for Intervenor, Retail Clerks Union, Local 770.

Parker & Son, Inc., Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

I. Page

Introduction 2

II.

Counter-Statement of Case 2

III.

Summary of Argument 4

IV.

Argument 4

There Was Clearly Sufficient Evidence to Support the Board's Dual Findings That K-Mart and Its Licensees Were Joint Employers Within the Meaning of Section 9 of the Act and That the Employees of the Joint Employers Constitute an Appropriate Unit 4

V.

Conclusion 10

TABLE OF AUTHORITIES CITED

Cases

Page

Boire v. Greyhound Corp., 376 U.S. 473, 55 LRRM 2694 ..... 4, 5, 6, 7, 8

NLRB v. Checker Cab Co., 367 F. 2d 692, 63 LRRM 2243, cert. den. 385 U.S. 1008, 64 LRRM 2108 ..... 4, 7, 8, 9

NLRB v. Greyhound Corp., 368 F. 2d 788, 63 LRRM 2434 ..... 4, 6, 7, 8

NLRB v. Lund, 103 F. 2d 815, 819, 4 LRRM 607 ..... 4, 8

Statute

National Labor Relations Act, Sec. 9 4

Nos. 21,621, 21,632 and 21,649

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 21,621

GALLENKAMP STORES CO., *et al.*,

Petitioners,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,632

K-MART, a Division of S. S. KRESGE COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

No. 21,649

HOLLYWOOD HAT CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

RETAIL CLERKS UNION, LOCAL 770, affiliated with RETAIL CLERKS INTERNATIONAL ASSOCIATION, AFL-CIO,

Intervenor.

On Petition to Set Aside an Order of the National Labor Relations Board.

BRIEF OF INTERVENOR, RETAIL CLERKS UNION, LOCAL 770.

I.
INTRODUCTION.

Three separate briefs have been filed by the Petitioners in this matter. The main thrust of all the briefs of the Petitioners must be that there is not sufficient evidence in the record to support the finding of the Board that a joint employer relationship existed between K-Mart, a Division of S. S. Kresge Company (hereinafter referred to as "K-Mart") and its licensees at its stores in the City of Commerce, State of California. Intervenor's brief will deal with this major issue and with respect to all other issues raised by the Petitioners relies on the brief of the General Counsel.

II.
COUNTER-STATEMENT OF CASE.

As its statement of the case, Intervenor cites the following finding of the Board in its Decision and Direction of Elections in Case No. 21-RC-9309, which was the underlying representation case with reference to the Complaint and Decision which is the subject matter of the instant Petition [G.C. Ex. 5(a)]:

> "1. K-Mart, a Division of S. S. Kresge Company, herein referred to as K-Mart, owns and manages retail department stores in Westminster, Santa Ana, San Fernando, Commerce, Montclair and Costa Mesa, California. The three petitions involved herein cover Westminster, Santa Ana and Commerce. K-Mart stores consist of various departments, some of which are operated by licensees

pursuant to uniform lease agreements with K-Mart. The licensees include Gallenkamp Stores Co., which sell shoes, Mercury Distributing Company, which sells apparel, Acme Quality Paints, which sells household items, F & G Merchandising, which sells automobile accessories and services automobiles, Hollywood Hat Co., which sells hats, and Besco Enterprises, Inc., which sells jewelry and cameras. The licensed departments are integrated into the general operations of the stores and are unidentifiable. Under the license agreements, K-Mart retains control over advertising and merchandise, retains the right to audit the records of the licensees, retains control over the physical layout of the store and handles all complaints, exchanges and refunds through its service desk. All credit is approved by K-Mart. In addition, the licenses require the licensees to comply with rules and regulations which the licensor promulgates. These may cover such subjects as employment practices, personnel and store policies, and pricing of merchandise. The rules and regulations now in effect between K-Mart and each licensee allow K-Mart to take applications of persons desiring employment with the licensees and require the licensor and the licensee to check with each other before hiring a present employee or former employee of the other. Under these rules and regulations, the licensee agrees to operate its department during hours established by the licensor and not to continue a labor dispute which materially affects the sales or operations of other licensees or the licensor, and employees of the licensees are required to attend sales and training meetings."

III.
SUMMARY OF ARGUMENT.

The Board has the statutory authority to find that the Petitioners are joint employers for the purpose of Section 9 of the Act, and its finding of an appropriate unit is not arbitrary.

IV.
ARGUMENT.

There Was Clearly Sufficient Evidence to Support the Board's Dual Findings That K-Mart and Its Licensees Were Joint Employers Within the Meaning of Section 9 of the Act and That the Employees of the Joint Employers Constitute an Appropriate Unit.

The statutory authority of the Board to find a joint employer relationship for the purpose of a single bargaining unit of employees of multiple employers has long been recognized by the Courts. (*Boire v. Greyhound Corp.,* 376 U.S. 473 at 481, 55 LRRM 2694 (1964); *NLRB v. Checker Cab Co.,* 367 F. 2d 692 (C.A. 7, 1966), 63 LRRM 2243, cert. den. 385 U.S. 1008, 64 LRRM 2108 (1967); *NLRB v. Greyhound Corp.,* 368 F. 2d 788 (C.A. 5, 1966), 63 LRRM 2434; *NLRB v. Lund,* 103 F. 2d 815, 819 (C.A. 8, 1939), 4 LRRM 607).

In *Boire v. Greyhound, supra,* the Board had found that a multiple employer unit consisting of the employees of Greyhound and the employees of an outside janitorial contractor, Floors, Inc., who performed janitorial services at the Greyhound terminals, was appropriate. The lower federal courts had held that the Board had acted in excess of its authority under the Act upon the

grounds that the facts set forth in the Board decision were on their face insufficient to create a joint employer relationship but instead established that the janitorial contractor was an independent contractor. In reversing, the Supreme Court stated (*Boire v. Greyhound Corp., supra,* 376 U.S. at 475):

> "The Board found that while Floors hired, paid, disciplined, transferred, promoted and discharged the employees, Greyhound took part in setting up work schedules, in determining the number of employees required to meet those schedules, and in directing the work of the employees in question. The Board also found that Floors' supervisors visited the terminals only irregularly—on occasion not appearing for as much as two days at a time—and that in at least one instance Greyhound had prompted the discharge of an employee whom it regarded as unsatisfactory. On this basis, the Board, with one member dissenting, concluded that Greyhound and Floors were joint employers, *because they exercised common control over the employees,* and that the unit consisting of all employees under the joint employer relationship was an appropriate unit in which to hold an election. The Board thereupon directed an election to determine whether the employees desired to be represented by the Union.
>
> * * *
>
> ". . . The respondent points out that Congress has specifically excluded an independent contractor from the definition of 'employee' in §2(3) of the Act. (Footnote citation) It is said that the Board's finding that Greyhound is an employer of

> employees who are hired, paid, transferred and promoted by an independent contractor is, therefore, plainly in excess of the statutory powers delegated to it by Congress. This argument, we think, misconceives both the import of the substantive federal law and the painstakingly delineated procedural boundaries of *Kyne*. [*Leedom v. Kyne,* 358 U.S. 184, 43 LRRM 2222.]
>
> "Whether Greyhound, as the Board held, possessed *sufficient control* over the work of the employees to qualify as a joint employer with Floors is a question which is unaffected by any possible determination as to Floors' status as an independent contractor, since Greyhound has never suggested that the employees themselves occupy an independent contractor status. And whether Greyhound possessed *sufficient indicia of control* to be an 'employer' is essentially a factual issue, unlike the question in *Kyne,* which depended solely upon construction of the statute . . ." (Emphasis and parenthetical citation added.)

After many years of litigation, the Fifth Circuit recently upheld the finding by the Board that the bus company employees and the employees of the janitorial service company working at the company's terminals did constitute an appropriate joint employer bargaining unit. *NLRB v. Greyhound Corp., supra,* 368 F. 2d 778.

The *Greyhound* cases unequivocally hold that it is for the Board in the representation hearing to decide whether a joint employer relationship exists and whether the employees of the joint employers constitute an appropriate bargaining unit.

In the joint employer relationship before the Courts in the *Greyhound* cases and before this Court in the instant petitions, the joint employers may be designated as primary and secondary employers. In *Greyhound* the direct employer was the janitorial contractor who had the primary responsibility with respect to the basic working terms and conditions of hiring, paying, disciplining, transferring, promoting and discharging the janitorial employees, while Greyhound was a secondary employer with far less responsibilities and control over the joint employer-employee relationship. Similarly, in the instant case the lessees are the primary employers and K-Mart is the secondary employer in the joint employer-employee relationship.

The Petitioners in the present case appear to argue that K-Mart, the secondary employer, "must dominate" the employer-employee relationship between the licensees and their employees. This makes little sense in either logic or the law. The "indicia of control" sufficient to support a joint employer finding is that the multiple employers share or have common control over the employees and such common control can exist even though the secondary employer, such as K-Mart, does not dominate the multiple employer-employee relationship.

This is well illustrated by the Fifth Circuit's decision in *NLRB v. Checker Cab Co., supra,* 367 F. 2d 692. In that case clearly the dominant control over the employer-employee relationship was exercised by the individual members of Checker Cab Company. Checker Cab Company, however, was found to have had a degree of control sufficient to support a joint employer finding upon facts similar to those involved in the instant Petitions.

In the *Checker Cab Co.* case the individual members were the primary employers owning and operating their own cabs with final authority to hire and fire the drivers of its cabs. However, by the use of Checker Cab Company the member-employers had

> "banded themselves together so as to set up joint machinery for hiring employees, for establishing working rules for employees, for giving operating instructions to employees, for disciplining employees for violation of rules, for disciplining employees for violation of safety regulations." (367 F. 2d at 698.)

In the instant case K-Mart and all of its licensees have banded themselves together as an integrated operation in which to the public they are unidentifiable. They share control of virtually all of the aspects of the employer-employee relationship. Certainly the sharing of control set forth in the Decision and Direction of Election by the Board is more than sufficient under both the *Greyhound* cases and the *Checker Cab Co.* case to support a finding of a joint employer relationship.

The *Greyhound* and *Checker Cab Co.* cases also demonstrate the wide discretion granted to the Board in unit determinations involving joint employers and the limited function of the Courts. In the *Checker Cab Co.* case, *supra,* the Court quoted from the decision of the Eighth Circuit in *NLRB v. Lund,* 103 F. 2d 815, 819, 4 LRRM 697 (C.A. 8, 1939) as follows:

> " '. . . The inference to be drawn from these decisions of the Supreme Court and from the language of the statute is that, within the meaning of the Act, whoever as or in the capacity of an employer controls the employer-employee relations

in an integrated industry is the employer. So interpreted it can make no difference in determining what constitutes an appropriate unit for collective bargaining whether there are two employers of one group of employees or one employer of two groups of employees. Either situation having been established the question of appropriateness depends upon other factors such as unity of interest, common control, dependent operation, sameness in character of work and unity of labor relations. There may be others; but, unless the finding of the Board is clearly arbitrary upon the point, the court is bound by its finding. In the present instance the conclusion of the Board appears reasonable rather than arbitrary, and its finding is sustained.' "

Finally, with reference to the present Petitioner's contention that the Board's ruling in the K-Mart case forces employers to bargain together against their will, this issue was expressly raised in the *Checker Cab Co.* case, *supra.* The Court dealt with it as follows (367 F. 2d at 697):

"Early in its history the NLRB asserted its power to enter bargaining orders requiring independent employers to bargain jointly against their expressed wishes. In *Waterfront Employers Association of the Pacific Coast,* 71 NRLB 80, 111, 18 LRRM 1465 (1946), the Board said:

'We conclude, therefore, that this Board is empowered by the Act to find multiple-employer units appropriate for the purposes of collective bargaining, and that we may properly exercise that power under the circumstances in this case. We are not

persuaded otherwise by the fact that the companies and employer associations have indicated that they do not desire multiple-employer units. To hold in all cases, especially where the employers have themselves acted on a multiple-employer basis, that the Board is precluded in the face of employer opposition from finding a multiple-employer unit to be appropriate, is to permit the employers to shape the bargaining unit at will, notwithstanding the presence of compelling factors, including their own past conduct, decisively negating the position they have taken. Contrary to the mandate given the Board under the Act, such a holding would in effect vest in the hands of the employers rather than the Board the power to determine the appropriate unit for collective bargaining purposes.' "

V.

CONCLUSION.

It is respectfully submitted that the Board's Decision and Order of Election in the underlying representation case was reasonable, supported by the evidence, and not arbitrary. The Order of the Board in the unfair labor practice should, therefore, be enforced.

Dated: November 17, 1967.

Respectfully submitted,

ARNOLD, SMITH & SCHWARTZ,
By GEORGE L. ARNOLD,
Attorneys for Intervenor, Retail Clerks Union, Local 770.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

GEORGE L. ARNOLD